

## FORMING A MINNESOTA LIMITED LIABILITY COMPANY

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A limited liability company is a form of business organization with limited liability characteristics of a corporation and the ability to elect to be treated for tax purposes as a sole proprietorship (or disregarded entity), partnership or corporation. The formation and operation of a Minnesota limited liability company is governed by Minn. Stat. § 322B.

For a limited liability company that elects to be treated as a partnership or disregarded entity, business income and losses of the limited liability company are passed through to the owners of the business and is taxed at the owner's individual tax rate. As with a corporation, liability for business debts and obligations generally rests with the entity rather than with individual owners.

For a single-member limited liability company that elects to be taxed as a corporation, the taxation of profits that occurs is as a C corporation. As of 2009, when a single-member limited liability company taxed as a disregarded entity fails to pay federal unemployment taxes, the limited liability company, not the owner is now liable.

A limited liability company is not subject to many of the restrictions that apply to S corporations, such as a maximum of 100 shareholders, a single class of stock, and limited types of non-individual shareholders. All members of a limited liability company may participate in the active management of the company without risking loss of limited personal liability.

### ARTICLES OF ORGANIZATION

A limited liability company is formed by filing articles of organization with the Secretary of State and paying the filing fee. Minimum requirements for the articles of organization are provided on an articles of organization form that is available from the Secretary of State's website at [www.sos.state.mn.us/index.aspx?page=331](http://www.sos.state.mn.us/index.aspx?page=331), and is also available by mail from that office. The articles of organization may add to or modify many of the basic statutory provisions set forth in the Minnesota Limited Liability Company Act. An attorney can assist in drafting articles of organization to assure that the needs and desires of the members, as well as legal requirements, are met. Organizers of a limited liability company must be at least 18 years of age.

### Limited Liability Company Name

Requirements for the limited liability company name are discussed in the section on naming the business entity, earlier in the Small Business Assistance Office publication, *A Guide To Starting A Business In Minnesota*.

### Registered Office

A limited liability company must have a registered office located in the state of Minnesota. The registered office may be the place where the business is located or it may be in a different location. The registered office address must be the address of a physical location where a person who represents the limited liability company can be found. A registered office address cannot be a post office box. Acceptable registered office addresses include a complete street address, a rural

post office box. Acceptable registered office addresses include a complete street address, a rural route and rural route box or fire number or directions from a landmark to the office location. If directions are given, a mailing address in the same or an adjacent town must be given. All addresses must have a zip code.

## **Registered Agent**

The limited liability company is not required to name a registered agent in the articles of organization, but if the limited liability company decides to name an agent, the articles must list the name of the agent and the agent must be located at the registered office.

## **Names, Addresses and Signatures of Organizers**

The articles of organization must list the names and complete mailing addresses, including zip codes, of each of the organizers. There must be at least one organizer. Each organizer must be a natural person who is at least 18 years old. Each organizer must sign the articles.

## **Other Provisions**

There are a number of provisions that may be altered in the articles of organization but need not appear in the articles in order to properly form a limited liability company. A brief description of each of these provisions appears in Minn. Stat. § 322B.104 subdivisions 2, 3, and 4. Some of these provisions include:

- The power to adopt, amend or repeal the operating agreement is vested in the board of governors (Minn. Stat. § 322B.201);
- Governors serve for an indefinite term that expires at the next regular meeting of the members (Minn. Stat. § 322B.606);
- A limited liability company must allow cumulative voting for governors (Minn. Stat. § 322B.610);
- Absent governors may be permitted to give written consent or opposition to a proposal (Minn. Stat. § 322B.615);
- A larger than majority vote may be required for board of governor action (Minn. Stat. § 322B.617);
- The affirmative vote of a majority of governors present is required for an action of the board of governors (Minn. Stat. § 322B.617);
- A written action by the board of governors taken without a meeting must be signed by all governors (Minn. Stat. § 322B.618);
- All membership interests have equal rights and preferences in all matters not otherwise provided for by the board of governors (Minn. Stat. § 322B.401, subdivision 5, clause 2);
- A member has certain preemptive rights, unless otherwise provided by the board of governors (Minn. Stat. § 322B.310);

- The voting power of each membership interest is in proportion to the value reflected in the required records of the contributions of the members (Minn. Stat. § 322B.318);
- Members share in distributions in proportion to the value reflected in the required records of contributions of the members (Minn. Stat. § 322B.501);
- Members share in profits and losses in proportion to the value reflected in the required records of the contributions of the members (Minn. Stat. § 322B.309).

## **Amending Articles of Organization**

A limited liability company may amend its articles of organization to include or modify any provision that is required or permitted to appear in the articles or to omit any provision not required to be included. Amendments are required when any changes are made in the articles of organization. The amendment form is available at the Secretary of State's website at [www.sos.state.mn.us/index.aspx?page=331](http://www.sos.state.mn.us/index.aspx?page=331), and is also available by mail from that office.

Articles of organization may be amended by submitting the amendment to the members at a regular or special meeting called with proper notice. Proper notice means that information on the time, location and meeting agenda and a brief description of the amendment is mailed to each member at least ten days before the meeting, unless other laws or the articles or bylaws permit a shorter time for notice. The amendment must be approved by a majority of the voting power of the members unless the articles require a larger majority or the amendment will increase a majority already required in the articles of a closely held limited liability company. If this larger majority is to be adopted, the amendment must be approved by this higher majority.

Electronic meetings and participation by electronic means are permitted in Minnesota. Consult your attorney for further information on how to properly set up a virtual meeting, do corporate business by electronic mail, or allow electronic participation in physical meetings.

The articles of amendment must include the following provisions: the name of the limited liability company as it appears in the records of the Secretary of State; the text of the amendment; and a statement that the amendment was adopted pursuant to Minn. Stat. § 322B. There is a filing fee.

A limited liability company also may restate its articles of organization in their entirety. In addition to stating the name of the limited liability company and reciting that the restatement was approved pursuant to Minn. Stat. § 322B, all articles are presented in the language which the limited liability company now wishes to use. In other words, all changes are combined in one document. A restatement that includes substantive amendments must be approved by the members in the same way as any other amendment is approved. If the restatement is only to combine all previous changes into one document, only the board of governors need approve.

Articles of amendment must be signed by a person who has been authorized by the limited liability company to sign such documents.

## **Change of Registered Office or Registered Agent**

Every time a limited liability company moves or changes its registered agent, it must report the new information to the Secretary of State on a change of address/agent form which is available at the Secretary of State's website at [www.sos.state.mn.us/index.aspx?page=331](http://www.sos.state.mn.us/index.aspx?page=331), and is also available by mail from that office. The form states the name of the limited liability company, the new address of the registered office, the name of the new registered agent, if one is being appointed, and that the change was approved by the board of governors.

If a registered agent is appointed, the registered agent must be physically located at the registered office address. The statement must be signed by an authorized representative of the limited liability company. There is a filing fee.

The registered office address and agent information can also be changed using the amendment procedure described above.

## **POST-ORGANIZATION ISSUES**

### **General Considerations**

After the limited liability company is formed, it must perform certain start-up tasks, such as obtaining federal and state tax identification numbers, obtaining an unemployment insurance employer account number, setting up and maintaining the books and records of the business, calling and conducting the initial meeting of the board of governors or members, and taking other actions. All actions taken and decisions made by the limited liability company through its governors, managers and members must conform with the articles of organization, operating agreement, and applicable law. All actions and decisions should be recorded in the company's minute book. Specific guidance on post-organization issues may be obtained from the company's legal and tax advisors.

### **Annual Registration**

Both Minnesota and non-Minnesota limited liability companies must register with the Secretary of State once every year. The Secretary of State will send a registration form to the limited liability company at its registered office. The form is also available at the Secretary of State's website at [www.sos.state.mn.us/index.aspx?page=331](http://www.sos.state.mn.us/index.aspx?page=331), and is also available by mail from that office. The registration is due before the end of the calendar year. Failure to file will result in administrative termination. Reinstatement may occur within one year of the date of the administrative termination by filing the registration form and paying a reinstatement fee.

### **Operating Agreements**

Many aspects of business can be controlled by a document called an operating agreement, which is similar in function to a corporate shareholder agreement. Operating agreements are fact-specific to the circumstances of each limited liability company, and limited liability company members should consult with legal counsel in creating or signing such agreements.

## **FOREIGN LIMITED LIABILITY COMPANIES DOING BUSINESS IN MINNESOTA**

A limited liability company that is organized under the laws of a state other than Minnesota that transacts business in Minnesota must obtain a certificate of authority before doing business in Minnesota. The requirements for obtaining the certificate of authority are specified by Minn. Stat. § 322B.90 to 322B.955, and are set forth on forms available from the Secretary of State's website at [www.sos.state.mn.us/index.aspx?page=331](http://www.sos.state.mn.us/index.aspx?page=331), and is also available by mail from that office. A certificate of status or certificate of good standing from the state or province of organization must accompany the registration form.

The term "transacting business" is not clearly defined in the law, but the standard used in making the determination is the "minimum contacts" standard used in determining jurisdiction. Under this standard the facts are analyzed by the limited liability company to determine whether the business or its local agents have conducted a continuous course of business in Minnesota or with Minnesotans sufficient to justify being governed by Minnesota law.

Neither the Secretary of State nor any other state agency will make a determination as to whether a particular limited liability company should register as a foreign limited liability company. As a general rule, doubts should be resolved in favor of registering the organization. Minn. Stat. § 322B.945 establishes certain activities as exceptions to the registration requirement. Limited liability companies organized under the laws of a state other than Minnesota should consult with their legal counsel to determine whether any of the exceptions apply.

In addition to obtaining the certificate of authority, a foreign limited liability company must obtain a Minnesota tax identification number from the Minnesota Department of Revenue. If the company will have employees in Minnesota, it also must complete the Minnesota Department of Revenue's withholding tax forms and arrange for workers' compensation insurance. The procedure for obtaining these numbers and forms is described in the section of this Guide on business taxes and the Checklist for Hiring an Employee.

If the foreign limited liability company changes the name or address of its registered agent or other statements made in the application for the certificate of authority become inaccurate, the foreign limited liability company must file an amended certificate of authority with the Secretary of State. A foreign limited liability company also must obtain any state and local business licenses necessary to conduct business operations. Information on business license requirements may be obtained from the Small Business Assistance Office at the address and telephone number provided in the Resource Directory section of this Guide.